## KAMARUSHAM ZAKARIA v. PP

HIGH COURT MALAYA, KOTA BHARU
AHMAD BACHE JC
[CRIMINAL APPEAL NO: 42S-58-10-2016]
17 AUGUST 2017

***CRIMINAL PROCEDURE:*** *Revision – Review of conviction and sentence – Knife found in pocket of trousers – Accused found guilty of possessing dangerous weapon in public place without lawful excuse or authority – Accused sentenced to five years imprisonment – Whether minimum sentence of five years imprisonment under s. 6(1) of Corrosive and Explosive Substances and Offensive Weapons Act 1958 mandatory or directory – Whether accused entitled to be bound-over for good behaviour – Whether conviction and sentence safe – Criminal Procedure Code, s. 325*

***STATUTORY INTERPRETATION:*** *Interpretation of Act – 'shall be liable' – Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1) – Whether minimum sentence of five years imprisonment under s. 6(1) of Corrosive and Explosive Substances and Offensive Weapons Act 1958 mandatory or directory – Whether word 'liable' connotes discretion of court*

The appellant was stopped by the police while riding his motorcycle. Suspecting that something was amiss, the police carried out a body search on the appellant which led to the discovery of a small knife kept in the pocket of his trousers. The appellant was subsequently arrested and later charged at the Sessions Court for having in his possession in a public place, a dangerous weapon, without lawful excuse or authority, an offence under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('the Act'). The appellant pleaded guilty to the charge and the Sessions Court Judge convicted him for the offence and sentenced him to five years imprisonment. Hence, the present appeal. The appellant did not file an application for an extension of time to file a notice of appeal on the sentence. As the disposal of the appeal process would take a while and the appellant was serving sentence, the court used its discretion to convert the appeal as a revision under s. 325 of the Criminal Procedure Code ('the CPC') for both conviction and sentence. In support of his appeal, the appellant submitted that the minimum sentence of five years imprisonment under s. 6(1) of the Act was not mandatory but directory. Therefore, the appellant could be sentenced to an imprisonment term of less than five years and alternatively entitled to a bound-over for good behaviour.

**Held (affirming conviction; substituting sentence with order that appellant be released on bond of good behaviour):**

**(1)** The amended s. 6 of the Act was worded 'shall be liable', similar to the previous provision. The High Court in *PP v. Hassan Ali* ruled that because of the words 'be liable for imprisonment', the minimum

imprisonment of five years was not mandatory but merely directory. On appeal, whilst the Court of Appeal agreed that the words 'be liable' conferred discretionary power as opposed to the term 'shall be punished' which connoted an element of mandatory, the court ruled that as the provision provided a minimum sentence, it had to follow the minimum sentence provided for. This court was not only bound by the decision of the Court of Appeal but it also shared the same view that the word 'liable' connotes the discretion of the court. (paras 15 & 16)

**(2)** The amendment of s. 6 of the Act was to curb the rising number of planned serious crimes such as using firearms and dangerous weapons in robbery, murder, extortion, gang fights *etc*. However, there was no such scenario which could signify that the appellant *ie*, had just come back from a gang fight, or a blood-stained parang was found on him; nothing of that sort happened in this case. The inference that could be drawn in favour of the appellant was that the weapon, which was just a small knife kept in the pocket of his trousers, was more for self-protection. (paras 20 & 21)

**(3)** The appellant already served nine months of imprisonment which made him repentant and remorseful. Being too long behind bars might turn him into a hardened criminal. He had no criminal record and a bound-over under s. 294 of the CPC was the most appropriate. The order of bound-over did not, at all, exonerate the appellant of the offence that he had committed. He was convicted of the offence. However, the sentence was suspended and the conviction was recorded and will form part of his criminal record. (paras 22 & 23)

**Case(s) referred to:**
*Goh Kheng Seong v. PP [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep) 408 HC* ***(refd)***
*Jayanthan v. PP [1973] 1 LNS 56 FC* ***(refd)***
*Mahrus v. PP [1991] 1 LNS 45 HC* ***(refd)***
*Nor Afizal Azizan v. PP [2012] 6 CLJ 370 CA* ***(refd)***
*PP v. Hassan Ali Abdul Razak [2016] 9 CLJ 584 HC* ***(refd)***
*PP lwn. Kandasamy Muniandy [2005] 2 CLJ 201 HC* ***(refd)***
*PP v. Leonard Glenn Francis [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320 HC* ***(refd)***
*PP v. Man Ismail [1938] 1 LNS 54 HC* ***(refd)***
*PP v. Nordin Yusmadi [1996] 2 CLJ 90 HC* ***(refd)***
*PP v. Wahab [1964] 1 LNS 150 HC* ***(refd)***

**Legislation referred to:**
Corrosive and Explosive Substances and Offensive Weapons Act 1958, s. 6(1)
Criminal Procedure Code, ss. 294(1), 325

*For the appellant - Latifah Ariffin; M/s Latifah Ariffin & Co*
*For the respondent - Shaharaliza Ab Razak; DPP*

*[Editor's note: Appeal from Sessions Court Kelantan; No: SPM(A)62-41-09-2016]*

*Reported by Najib Tamby*

## JUDGMENT

**Ahmad Bache JC:**

**Background**

**[1]** The appellant/accused was charged at the court below for having in his possession in a public place, a dangerous weapon that was a knife, without lawful excuse or authority, an offence under s. 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 (Act 357) punishable under the same section.

**[2]** The appellant/accused was not represented. After the charge was read and explained to him, the appellant/accused pleaded guilty. After being satisfied that the appellant/accused understood the nature and consequences of his plea of guilty, and after being satisfied that the plea given was unequivocal and unqualified, and that the facts of the case to which the accused admitted had revealed that the appellant/accused committed the offence, the Sessions Judge convicted him and sentenced him to a minimum of five years imprisonment from the date of his arrest.

**[3]** Dissatisfied, the appellant/accused filed an appeal on conviction in this court.

**[4]** Subsequently, however, counsel for the accused filed an application for an extension of time to file a notice of appeal on sentence as well. At the hearing, counsel indicated to this court that she would argue on the basis of a recent decision of the Shah Alam High Court which ruled that the five years minimum imprisonment under the amended s. 6(1) of the Act was not mandatory.

**[5]** As the disposal of the appeal process would take a while and the appellant/accused was serving sentence, instead, this court used its discretion to convert the appeal as a revision under s. 325 of the Criminal Procedure Code ('the CPC') for both conviction and sentence.

**[6]** Upon hearing the submission of both parties, this court affirmed the conviction, but substituted the sentence with an order that the appellant/accused be released on a bond of good behaviour for five years under s. 294(1) of the CPC, with one surety and security of RM2,000.

**[7]** Dissatisfied with the decision of this court, the Public Prosecutor filed an appeal in respect of the sentence to the Court of Appeal. Hence, these are the grounds of judgment of this court.

**The Charge**

**[8]** The charge against the appellant/accused reads:

> Bahawa kamu pada 24/09/2016 jam lebih kurang 11.00 malam bertempat di Bawah Jambatan Tendong di dalam Daerah Pasir Mas, di dalam Negeri Kelantan, telah didapati dalam milikan kamu senjata berbahaya iaitu sebilah pisau tanpa sebarang kebenaran atau maksud yang sah. Oleh yang

demikian kamu telah melakukan suatu kesalahan di bawah Seksyen 6(1) Akta Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 dan boleh dihukum dibawah seksyen yang sama.

**The Facts Of The Case**

**[9]** The fact of the case (P1) are reproduced in *verbatim* below:

Pada jam lebih kurang 11.00 malam, Pengadu Asp Hamdan Bin Ali Hassan bersama (4) anggota yang lain telah tahan dan periksa 1 lelaki dalam keadaan mencurigakan menaiki motorsikal no DBE 6802 di bawah jambatan Tendong, 17030 Pasir Mas, Kelantan.

Pengadu perkenalkan diri sebagai pegawai kanan polis dengan menunjukkan kad kuasa polis dan menangkap lelaki tersebut. Pemeriksaan diri Tertuduh dapati nama Kamarusham bin Zakaria Kpt: 760715-03-526.

Dengan disaksikan Tertuduh, Pengadu buat pemeriksaan lanjut ke atas tubuh badan Tertuduh dan telah menjumpai (1) bilah pisau di dalam poket seluar panjang sebelah kanan bahagian hadapan.

Pengadu bersama anggota tangkap Tertuduh dan rampas barang kes serta serah kepada Pegawai Penyiasat Jenayah IPD Pasir Mas untuk siasatan lanjut.

Hasil siasatan dijalankan. Tertuduh mengaku dalam milikannya senjata berbahaya iaitu (1) bilah pisau tanpa sebarang kebenaran atau maksud yang sah semasa diperiksa oleh Polis. Tertuduh telah dituduh di bawah seksyen 6(1) Akta Bahan Letupan Dan Senjata Berbahaya dan mengaku salah sebagaimana pertuduhan hari ini.

**The Decision Of The Sessions Judge On Sentence**

**[10]** As the appellant did not file an appeal on sentence, the grounds of judgment provided by the learned trial judge was in respect of the conviction. However, at p. 8 vol. 1 of the appeal record, he stated that:

Hukuman yang boleh dikenakan bagi kesalahan ini ialah penjara bagi suatu tempoh tidak kurang daripada 5 tahun dan tidak melebihi 10 tahun dan boleh juga disebat.

Hukuman yang saya jatuhkan ke atas OKT ialah penjara 5 tahun bermula dari tarikh tangkap, iaitu hukuman pemenjaraan minima yang boleh dikenakan ke atas OKT.

**The Arguments Of Parties On Sentence**

**[11]** Learned counsel argued before this court that the minimum sentence of five years imprisonment under s. 6 of Act 357 is not mandatory but directory. Hence, argued learned counsel, the appellant/accused could be sentenced to an imprisonment term of less than five years, and alternatively entitled for a bound-over for good behaviour. Learned counsel referred to the case of the Shah Alam High Court in *PP v. Hassan Ali Abdul Razak* [2016] 9 CLJ 584 at p. 588 where the court said:

[13] In my considered view, the use of the words "shall be liable" in the law must be distinguished from the words "shall be punished with". With the words "shall be punished with" used, it gives no discretion to the court. However, the court is vested with the discretionary power to pass sentence of imprisonment not more than the maximum as provided in the law when the phrase "be liable" is used. It contained no mandatory connotation; likewise in this case. The word "liable" was explained by Brown J in the case of *Ng Chwee Puan v. Regina* [1953] 1 LNS 60; [1953] MLJ 86 as follows:

> But the word **"liable" - contains no obligatory or mandatory connotation. Sitting in this Court, with a table fan blowing directly on to me, I am "liable" - to catch a cold. But it does not follow that I shall**. (emphasis added)

[14] Since the words "be liable" is used in the said **s. 6(1) of the Act**, this court ruled that it is meant to allow the court with a discretion to pass sentence as it thinks fit after assessing the available evidence and particular facts of the case. In other words, imprisonment is not mandatory (*PP v. Wahab* [1964] 1 LNS 150; [1964] 1 MLJ 265; *PP v. Lee Ah Sam* [1949] 1 LNS 62; [1949] 1 MLJ 236; *Jayanthan v. PP* [1973] 1 LNS 56; [1973] 2 MLJ 68).

**[12]** The learned DPP submitted otherwise, and referred to the Hansard in which it was stated that when the amendment was tabled in Parliament, the minimum five years imprisonment was intended to be mandatory.

**Assessment And Findings Of This Court**

**[13]** This court had made an analysis of this section and found it germane to distinguish the old and the amended provision.

**[14]** The previous provision reads:

> 6 (1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term not exceeding two years, and to whipping.

Whereas the amended provision reads:

> 6(1) Any person who in any public road or place carries or has in his possession or under his control any offensive weapon otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term of not less than five years and not more than ten years, and to whipping.

**[15]** The amended provision, in force from 2 July 2014, is worded "shall be liable", similar to the previous provision. The terms "shall be punished" and "be liable to be punished" were subjected to much judicial discussions. (See *PP v. Wahab* [1964] 1 LNS 150; [1964] 1 MLJ 265; *Jayanthan v. PP* [1973] 1 LNS 56; [1973] 2 MLJ 68; *Mahrus v. PP* [1991] 1 LNS 45; [1992] 1 MLJ 561; *Goh Kheng Seong v. PP* [1992] 4 CLJ 2133; [1992] 2 CLJ (Rep)

408; [1993] 1 MLJ 103; *PP v. Man Ismail* [1938] 1 LNS 54; [1939] MLJ 207; *PP v. Nordin Yusmadi* [1996] 2 CLJ 90; *PP v. Leonard Glenn Francis* [1989] 1 CLJ 972; [1989] 2 CLJ (Rep) 320; [1989] 2 MLJ 158.

**[16]** The High Court in *PP v. Hassan Ali (supra)* ruled that because of the words employed was "be liable for imprisonment" in s. 6 of Act 357, hence the minimum imprisonment of five years was not mandatory but merely directory. On appeal to the Court of Appeal (Rayuan Jenayah No. B-09(H)-302-08-2016)(unreported), whilst the Court of Appeal agreed that the words "be liable" confers discretionary power as opposed to the term "shall be punished" which connotes an element of mandatory, the court ruled that as the provision provides a minimum sentence hence it has to follow the minimum sentence provided for (see *PP lwn. Kandasamy Muniandy* [2005] 2 CLJ 201). This court is not only bound by the decision of the Court of Appeal, and would further state that it shared the same view that the word "liable" connotes the discretion of the court.

**[17]** The next question was could an order of bound-over, or bond of good behaviour, under s. 294 CPC, be imposed on those who committed this offence. While this court is not bound by the Hansard again but for purpose of the tabling of the amendment, this court could glean the reasons for the tabling of the amendment was that there was an increased use of offensive or deadly weapons to perpetrate serious crimes, such as committing murder and robbery, gang fights, extortions using firearms, or any corrosive materials as dangerous weapons etc.

**[18]** At p. 81 of the Hansard dated 10 April 2014 it is stated:

> Pertama, Yang Berhormat menyebut persoalan hukuman yang kita letak di sini sebagai mempunyai minimum sentence dan tidak boleh dihukum kurang daripada itu dan maksimumnya memang kita tahu. Semua yang mempunyai latihan sebagai peguam Yang Berhormat, bila melihat perkara ini berlaku kita berasa bimbang kerana tidak ada memberi laluan budi bicara kepada pihak hakim semasa menjalankan kes itu di mahkamah. Akan tetapi biarlah saya mula dengan sedikit mukadimah.
>
> Sebenarnya walaupun dalam undang-undang ini mengatakan bahawa minimum sentence itu berapa tahun dan maksimumnya berapa tahun. **Maknanya kalau dia didapati bersalah di bawah undang-undang ini, hukuman yang bakal hakim beri kepada dia ialah minimum** tetapi dalam masa yang sama Tuan Pengerusi, kuasa mahkamah dalam mengenakan hukuman kepada pesalah, dalam sudut lain tidak pernah diambil. **Umpamanya di bawah seksyen 294 Kanun Tatacara Jenayah yang mana mahkamah boleh memberi bon berkelakuan baik, sama tempoh yang ditetapkan oleh mahkamah**.
>
> (penekanan ditambah)

**[19]** Hence, it is patently clear that the intention of the Parliament is to enable a person convicted under this provision to be permitted to be released on bond for good behaviour, according to the satisfaction of the court. This

was also affirmed in the case of *PP v. Hassan Ali (supra)*, where the Court of Appeal had affirmed the order of bound-over under s. 294 CPC handed down by the High Court.

**[20]** Back to the instant case, this court would like to reiterate that the amendment was to curb the rising number of planned serious crimes such as using firearms and dangerous weapons in robbery, murder, extortion, gangland fights etc. although such elements were not borne out from the facts of this case.

**[21]** There were no such scenario as samurai swords found in the boot of the car he was assumed driving with few others inside, which could signify that he and the rest had just come back from a gang fight; or a bloodstained parang, or long knife found on him, which could all be inferred that the accused had stabbed someone after a fight or a robbery etc. Nothing of that sort happened here in this case as there was nothing to that effect mentioned in the "hasil siasatan". In the absence of all those facts, the inference that could be drawn in favour of the accused in this case, *albeit* an unlawful possession was that the weapon which was just a small knife kept in his trousers pocket was more for self-protection.

**[22]** Having considered the above factors, and more importantly the factors, that he had already served nine months of imprisonment which made him repentant and/remorseful, and that being too long behind bars might turn him into a hardened criminal, and that he has no criminal record, this court had to balance the demands of public interest and that of the interest of the accused. This court was of the considered opinion that a bound-over under s. 294 CPC was most appropriate.

**[23]** Further, this court was of the considered opinion that this order of bound-over did not at all exonerate the appellant/accused of the offence that he had committed. He was in fact convicted of the offence, only that the sentence was suspended, and the conviction recorded and will form part of his criminal record. (see *Jayanthan v. PP* [1973] 1 LNS 56; *Nor Afizal Azizan v. PP* [2012] 6 CLJ 370.

**Conclusion**

**[24]** This court was of the considered opinion that judicial intervention was necessary to avoid injustice to the accused especially the fact that he had already served nine months in prison. In the upshot, this court affirmed the conviction of the appellant/accused but his sentence was substituted with an order that the appellant/accused be released on a bond of good behaviour under s. 294(1) of the CPC with one surety and security of RM2,000.

Order accordingly.